(3)

Supreme Court, U.S.
FILED
MAY 31 1995

NO. 94-1668

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROSEMARY RAHN,

Petitioner,

v.

DRAKE CENTER, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT DRAKE CENTER, INC.'S BRIEF IN OPPOSITION TO PETITIONER ROSEMARY RAHN'S PETITION FOR WRIT OF CERTIORARI

Robert S Brown (OH #0004756)
(Member of the Court)
Kathryn Knue Przywara (OH #0043730)
Attorneys for Respondent
BROWN, CUMMINS & BROWN CO., L.P.A.
3500 Carew Tower, 441 Vine Street
Cincinnati, Ohio 45202
(513) 381-2121

27

QUESTION PRESENTED FOR REVIEW:

Whether, based on the facts of this case, an employee's complaints about a hospital's new management policies, work rules and working conditions are simply a "quintessential employee beef" by a disgruntled employee, and thus not protected speech.

RULE 29.1 STATEMENT

Drake Center, Inc. has no parent company and no corporate subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW: i

RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES v

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 4

III. ARGUMENT: FOLLOWING THIS COURT'S DIRECTIVE IN CONNICK, THE SIXTH CIRCUIT PROPERLY EXAMINED THE *CONTEXT, CONTENT AND FORM* OF RAHN'S SPEECH AND CONCLUDED THAT SHE SPOKE AS AN EMPLOYEE AND NOT AS A PRIVATE CITIZEN. 4

A. THE SIXTH CIRCUIT'S CONCLUSION WAS CORRECT UNDER CONNICK, BECAUSE THE *CONTEXT* OF RAHN'S SPEECH SHOWED THAT SHE SPOKE ONLY AS AN EMPLOYEE. 5

B. THE SIXTH CIRCUIT PROPERLY CONCLUDED THAT THE *CONTENT* OF RAHN'S SPEECH WAS THE "QUINTESSENTIAL EMPLOYEE BEEF" ABOUT MANAGEMENT, AND NOT A MATTER OF PUBLIC CONCERN 9

1. The Five Areas about which the Committee Sought Clarification are Solely Employment-Related Concerns. 9

3. Rahn's Infusion of Popular Interest Buzz Words Were Clearly a Pretext for her own Personal Employment Grievances. 11

4. Rahn's Attempt to Implicate the Expenditure of Public Funds Does Not Provide First Amendment Protection to her Speech. 14

C. THE SIXTH CIRCUIT PROPERLY CONCLUDED THAT RAHN'S SPEECH DID NOT ELEVATE AN EMPLOYEE DISPUTE INTO A MATTER OF PUBLIC CONCERN BECAUSE SHE LABELED IT A "PRESS RELEASE" AND SOUGHT MEDIA COVERAGE. 15

III. CONCLUSION 16

CERTIFICATE OF SERVICE 17

APPENDIX . . . . . A

TABLE OF AUTHORITIES

CASES: **Page**

Barnes v. McDowell, 848 F.2d 725 (6th Cir. 1988), reh'g denied, 1988 U.S. App. LEXIS 11560 (6th Cir. 1988), cert. denied, McDowell v. Barnes, 488 U.S. 1007 (1989) 4, 14, 15

Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987) 7

Connick v. Myers, 461 U.S. 138 (1983) 1, 4, 5, 12

Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983) 10

Davis v. West Community Hospital, 755 F.2d 455 (5th Cir. 1985) 7

Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d 775 (2d Cir. 1991), cert. denied, 502 U.S. 1013 (1991) 6

Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986) 1, 7, 12

Frazier v. King, 873 F.2d 820, reh'g denied en banc, 878 F.2d 1435 (5th Cir. 1989), cert. denied sub nom, Davoli v. Frazier, 493 U.S. 977 (1989) 8

Gillum v. City of Kerrville, 3 F.3d 117 (5th Cir. 1993), cert. denied, _ U.S. _ , 114 S.Ct. 881 (1994) 12

Gomez v. Texas Dept. of Mental Health & Mental Retardation, 794 F.2d 1018 (5th Cir. 1986) 12

Landrum v. Eastern Kentucky University, 578 F.Supp. 241 (E.D. Ky. 1984) 9

Luck v. Mazzone, 1995 U.S.App. LEXIS 9101 (2d Cir. 1995) 15

Martinez v. City of Opa-Locka, Florida, 971 F.2d 708 (11th Cir. 1992) 8

Matulin v. Village of Lodi, 862 F.2d 609 (6th Cir. 1988) . . 15

McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1982) . . . 8

McMurphy v. City of Flushing, 802 F.2d 191 (6th Cir. 1986) 12

Mount Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) 10

Murray v. Gardner, 741 F.2d 434 (D.C. Cir. 1984), cert. denied, 470 U.S. 1050 (1985) 14

Noyola v. Texas Department of Human Resources, 846 F.2d 1021 (5th Cir. 1988) 7

O'Connor v. Steeves, 994 F.2d 905 (1st Cir. 1993), cert. denied sub nom, Town of Nahant v. O'Connor, __ U.S. __, 114 S.Ct. 634 (1993) 7

Patrick v. Miller, 953 F.2d 1240 (10th Cir. 1992) 8

Pickering v. Board of Education, 391 U.S. 563 (1968) 2, 5, 13, 15

Rankin v. McPherson, 483 U.S. 378, reh'g denied, 483 U.S. 1056 (1987) 11

Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988) 15

Rookard v. Health and Hospitals Corp., 710 F.2d 41 (2d Cir. 1983) 6

Shands v. City of Kennett, 993 F.2d 1337, reh'g, en banc, denied, 1993 U.S. App. LEXIS 17211 (8th Cir. 1993), cert. denied, __ U.S. __, 114 S.Ct. 880 (1994) 13, 14

Stroman v. Colleton County School District, 981 F.2d 152 (4th Cir. 1993) 8

CONSTITUTION:

First Amendment 4, 13, 14

I. INTRODUCTION

This is an employment case, not a constitutional case. Respondent Drake Center, Inc. ("Drake Center") is a private corporation[1] which operates a hospital facility in Cincinnati, Ohio. Petitioner Rosemary Rahn, a part-time nurse at that facility was discharged when her absenteeism reached the level of mandatory discharge under Drake Center's attendance policy. Rahn claims she was discharged because she issued a press release that was critical of Drake Center's management and new work rules and conditions at the hospital. In fact, Rahn viciously attacked the management techniques of the hospital administrator, whom she described as "the devil," and other members of the administration, whom she described as "carefully selected henchmen."

On appeal, the Sixth Circuit concluded that Rahn did not engage in protected speech because ***the content, form and context*** of Rahn's press release amounted to nothing more than "quintessential employee beef" by a disgruntled employee. The Sixth Circuit saw through Rahn's self-serving attempts to transform her personal employee grievances into a matter of public concern by "invoking a supposed popular interest in the way public institutions are run." Ferrara v. Mills, 781 F.2d 1508, 1516 (11th Cir. 1986).

That decision is consistent with this Court's recognition in Connick v. Myers, 461 U.S. 138, 147 (1983) that:

> . . . when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, ***a federal court is not the appropriate forum in which to review the wisdom of a personnel decision*** taken

---

[1] Drake Center argued in the trial court and in its appeal that Rahn's discharge did not involve state action. For purposes of its decision, however, the Sixth Circuit assumed that state action was present. (Slip Opinion at 9).

> by a public agency allegedly in reaction to the employee's behavior.

(citations omitted)(emphasis added). The Sixth Circuit's decision is also consistent with this Court's decisions in Pickering v. Board of Education, 391 U.S. 563 (1968) and its progeny and the decisions in other circuits. Thus, Rahn's petition should be denied.

II. STATEMENT OF THE CASE

Prior to the formation of Drake Center (a private non-profit corporation) on July 1, 1989, the hospital facility had been owned and operated by Hamilton County, Ohio ("County"). The hospital had lost its accreditation, lost its Medicare certification, and was plagued by a high rate of employee absenteeism. Prior to July 1, 1989, Rahn attended a nurses' meeting at which the hospital administrator, Earl Gilreath, criticized the nurses for not having passed an inspection. Later, Rahn complained to the hospital ombudsman and subsequently to Gilreath, about vacation, staffing and the employment relationship between the nurses and Gilreath.

After the passage of a County tax levy to benefit the hospital, Drake Center, a private non-profit corporation was formed to operate the hospital facility. Employee absenteeism remained a problem, and Drake Center developed a new system for sick days and vacation days and a new attendance policy.[2] Rahn contacted a County commissioner apparently complaining about the new private entity. The commissioner understood that Rahn was only raising employment issues as evident in a letter. He notified Rahn that he had written to Gilreath:

---

[2] Rahn's employment was terminated when she accumulated three points under the new attendance policy. (Slip Opinion at 5).

> requesting that he contact you and take other steps as appropriate to make cer[t]ain that ***all employees understand the new governing structure and how it will operate.*** (emphasis added).

On July 18, 1989, prior to her termination, Rahn, Chairman of the "Committee to Maintain and Improve Drake Hospital," issued a press release. Rahn essentially claims that the press release addressed matters of public concern when it alleged the inefficient spending of tax levy money,[3] because that ***somehow*** implied the ***possible*** existence of corruption.[4] She also argues that her statement disclosed possible patient endangerment ***concerns***. However, the purpose of the press release clearly was to seek a response from Drake Center on the following ***employment*** issues: new work rules, short and long range goals, philosophies, staffing, budget, patient mix, employee benefits and retirement funds. After Rahn provided local media with the press release inviting them to her press conference, she was interviewed on the steps of Drake Center by a television station.

Drake Center moved for summary judgment arguing, among other things, that the press release did not address matters of public concern. After the district court denied Drake Center's motion, the case was tried to a jury. The jury returned a verdict for Rahn. The district court later denied Drake Center's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New

---

[3] Rahn seeks to characterize herself as a concerned citizen by citing her past work for the Drake levy. However, Rahn's work for passage of the levy had an obvious employment motivation: without the levy, the hospital would have closed and Rahn would have lost her job.

[4] Rahn claimed Gilreath had said he was going to spend the taxpayers' money any way he wanted and she thought that the flowers planted outside the hospital were "expensive" and "lavish."

Trial. Drake Center appealed to the Sixth Circuit where the court, without addressing any of the other issues raised in the appeal, found that Rahn's press release did not touch upon a matter of public concern, and therefore was not deserving of First Amendment protection. (Slip Opinion at 17). The Sixth Circuit subsequently denied Rahn's petition for rehearing *en banc*. (See Appendix A).

REASONS FOR DENYING THE WRIT

III. ARGUMENT: FOLLOWING THIS COURT'S DIRECTIVE IN CONNICK, THE SIXTH CIRCUIT PROPERLY EXAMINED THE *CONTEXT, CONTENT AND FORM* OF RAHN'S SPEECH AND CONCLUDED THAT SHE SPOKE AS AN EMPLOYEE AND NOT AS A PRIVATE CITIZEN.

Rahn's press release did not address matters of public concern and therefore is not protected speech. Viewed separately or in context, the press release only reflected Rahn's grievances as a Drake Center employee.

Whether a public employee has been terminated for exercising her first amendment right begins with an analysis of whether the speech may be "fairly characterized as constituting speech on a matter of public concern." Connick, 461 U.S. at 146. Rahn agrees that whether an employee's speech addresses a matter of public concern must be determined by the "***content, form, and context*** of a given statement, as revealed by the whole record." *Id.* at 147-48 (emphasis added). (Respondent's Brief at 17). Speech of a public employee speaking as a citizen upon matters of public concern is entitled to constitutional protection, while speech of a public employee speaking upon matters only of a personal interest is not. *Id.* at 147; Barnes v. McDowell, 848 F.2d 725 (6th Cir.

1988), reh'g denied, 1988 U.S. App. LEXIS 11560 (6th Cir. 1988), cert. denied, McDowell v. Barnes, 488 U.S. 1007 (1989).

Following this Court's directive in Connick, the Sixth Circuit properly concluded that Rahn spoke as a private citizen.

A. THE SIXTH CIRCUIT'S CONCLUSION WAS CORRECT UNDER CONNICK, BECAUSE THE *CONTEXT* OF RAHN'S SPEECH SHOWED THAT SHE SPOKE ONLY AS AN EMPLOYEE.

Rahn's history of complaints about internal hospital policy demonstrate that she spoke only as an employee.

Rahn previously had complained to hospital administration about vacation, staffing and morale. *Supra* at 2-3. In addition, Rahn's inquiries to the county commissioner about the operation and governance of the new private entity, as evidenced by his response to her, demonstrate that she was continuing her complaints as a hospital employee. *Supra* at 3. This Court's decisions and decisions throughout the circuits support the conclusion that, in issuing her press release, Rahn spoke as an employee and not as a private citizen.

The Sixth Circuit's decision conforms to and follows this Court's reasoning in Pickering. In Pickering, the context in which the employee's speech was made clearly indicated that he spoke ***only*** as a private citizen. In Pickering, a proposed increase in the tax rate to be used for educational purposes was defeated by the voters. In connection with a second proposal for a tax increase, a teacher organization and the school board, in articles appearing in the local newspaper, urged passage of the tax increase in order to prevent the decline in the quality of education. In response to those articles, Pickering, a teacher, sent a letter to the editor attacking the school

board's handling of a prior bond issue, attacking the school's allocation of resources between the educational and athletic programs and accusing the superintendent of attempting to prevent teachers from speaking out in opposition to the tax increase. Unlike this case, there was no evidence that Pickering had ever complained about personnel matters and there was nothing in the letter itself to even remotely suggest that the speech related to personnel matters or internal operating policies at the school.

The Sixth Circuit's decision in this case is also in accord with the Second Circuit's opinion in Rookard v. Health and Hospitals Corp., 710 F.2d 41 (2d Cir. 1983), another case cited by Rahn. There, a nurse in a municipal hospital was fired after she brought evidence of malfeasance and corruption to the attention of the hospital's administrators and inspector general. The inspector general's investigation of Rookard's complaints showed that the hospital had in fact been overcharged by a nursing agency and that the hospital's plan to use unlicensed agency nurses clearly violated state rules and regulations. *Id.* at 44. Unlike this case, there was no evidence that Rookard was embroiled in an underlying employment dispute with the hospital or that her substantiated allegations of improper conduct and corruption were a pretext for purely employment-related issues.

In fact, in a number of cases with facts similar to this one, other circuits have reached precisely the same result the Sixth Circuit did here. See, e.g., Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d 775, 781 (2d Cir. 1991), cert. denied, 502 U.S. 1013 (1991)(resident's allegations that the hospital discriminated against her on the basis of her race and gender and her opinions on how to improve the residency program made in the context of her poor evaluation did not address matters of public concern, but rather

were aimed at protecting "her own reputation and individual development as a doctor."); Noyola v. Texas Department of Human Resources, 846 F.2d 1021 (5th Cir. 1988)(welfare services technician's question to his supervisor suggesting a large welfare case load and urging a realignment of his own case load made at a time when his level of performance was being questioned indicated that the technician spoke as an employee rather than in his role as a citizen); Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987)(while the incidence of sexual harassment in a public school is inherently a matter of public concern, employee's informal and confidential complaints regarding such conduct were attempts to resolve her private dilemma and thus did not involve matters of public concern); Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986)(teachers' objections to school's use of collegiate registration and out-of-field teacher placement motivated by teacher's own inability to control his students and made in the context of the school's denial of teacher's request for course assignments could not be fairly characterized as constituting speech on matters of public concern); Davis v. West Community Hospital, 755 F.2d 455 (5th Cir. 1985)(doctor's complaints to his superiors regarding personal grievances against various co-workers and administrators, comments about patient care and queries about possible conflicts of interest by two hospital board members did not involve any policy or practice of the hospital, were related only to isolated unsubstantiated acts by specific individuals, were made at a time when his own patient records were being scrutinized and did not constitute matters of public concern).[5]

---

[5] On the basis of context alone, other cases cited in Rahn's brief are also consistent with the Sixth Circuit's opinion. See, e.g., O'Connor v. Steeves, 994 F.2d 905 (1st Cir. 1993), cert. denied sub nom, Town of Nahant v. O'Connor, __ U.S. __, 114 S.Ct. 634 (1993)(statements by Superintendent of Public Works alleging improprieties by an incumbent elected official made

Given the existence of new work rules and conditions at the hospital and Rahn's prior history of employee complaints to Gilreath and a county commissioner, the context in which her speech was made supports the conclusion that she spoke as an employee and not as a public citizen.

---

in the context of a political feud between different factions of a town's Board of Selectman); Stroman v. Colleton County School District, 981 F.2d 152 (4th Cir. 1993)(teacher's letter complaining of school system's method of paying teachers and budgetary mismanagement was written in the context of a public debate over an impending budgetary crisis in the school system and whether public revenue bonds would be necessary); Martinez v. City of Opa-Locka, Florida, 971 F.2d 708 (11th Cir. 1992)(public employee made statements regarding unlawful expenditures of public funds in the context of subpoenaed testimony to the City Commission's Board of Inquiry and statement to an investigator to the State Attorney's Office); Patrick v. Miller, 953 F.2d 1240 (10th Cir. 1992)(in discussing qualified immunity issue, court noted that finance director's opposition to discriminatory employment practices based on race was not addressing employment practices and concerns affecting him directly; director's expressions of concern over use of retirement funds were made in his role as the fund's trustee at a public retirement board meeting); Frazier v. King, 873 F.2d 820, reh'g denied en banc, 878 F.2d 1435 (5th Cir. 1989), cert. denied sub nom, Davoli v. Frazier, 493 U.S. 977 (1989)(state correctional nurse's reports of violations of nursing practices to Department of Corrections and State Board of Nursing addressed matters of public concern and no underlying employment disputes were evident); McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1982)(probationary police officer who was the public representative of the policemen's labor organization had protested at city council meeting council's decision not to give police officers their annual raise and was interviewed by a local television station regarding the dispute between the city and its police officers).

B. THE SIXTH CIRCUIT PROPERLY CONCLUDED THAT THE *CONTENT* OF RAHN'S SPEECH WAS THE "QUINTESSENTIAL EMPLOYEE BEEF" ABOUT MANAGEMENT, AND NOT A MATTER OF PUBLIC CONCERN.

1. The Five Areas about which the Committee Sought Clarification are Solely Employment-Related Concerns.

That the press release was more of the same "employee beef" is confirmed by the substantive content of the speech, particularly the five areas on which the Committee sought action:

1. The purpose of the Committee, which was to "***preserve the existing human resources***, maintain the facility and encourage improvement" at the hospital, is an indication that the press release was directed at employee rather than public issues. (emphasis added).

2. The press release attacked the management techniques of the administrator Gilreath, whom Rahn described as "***the devil***," and called for his replacement. She also described one of the other administrators as engaging in "***strong arm and closed door tactics***." Such complaints can only be described as criticisms about the hospital management and its relationship to the employees. (emphasis added).[6]

---

[6] See Landrum v. Eastern Kentucky University, 578 F.Supp. 241, 247 (E.D. Ky. 1984)(professor's criticisms about the operation of university's real estate program, questions about the dean's competence and accusations that the dean was "a Hitler" who frequently lied and used informants dealt with individual disputes and grievances and were of "no relevance to the public's evaluations of governmental agencies.").

3. Criticisms about Gilreath and "***his carefully selected henchman***" and the relationship between the hospital and the University of Cincinnati are simply more complaints about how management would be governing the new hospital. (emphasis added).

4. The press release sought clarification on new work rules that "***caused widespread discontent among the hospital staff*** which has created a high absenteeism, possibly developing a patient endangerment situation." (emphasis added). The ***possibility*** of patient endangerment was an obvious strawman to disguise employee dissatisfaction with more stringent attendance requirements. Clearly, Rahn's focus here was on the new work rules and employee morale.

5. Rahn's critiques of the administration's failure to publish the ***short and long range goals and philosophies*** for the hospital demonstrate that Rahn, as an employee, did not have the input she wanted in the management of the new hospital.

6. Rahn's request for "***specific information about the staffing, budget and desired patient mix***" is simply a request for information of significance to hospital staff and not a matter of interest to the general public. (emphasis added).

7. Finally, Rahn's outcry about the "***desecration of employee benefits and retirement funds***" and the impact on employee morale are also clearly employee issues. (emphasis added).[7]

---

[7] Rahn's speech is distinguishable from Czurlanis v. Albanese, 721 F.2d 98, 104 (3d Cir. 1983)(county employee's speech at meeting of county board alleging inefficiency, false reports, duplication and unnecessary work in Division of Motor Vehicles constituted speech on matters of public concern when he did ***not*** discuss his pay, his hours, or the conditions of his employment.") and Mount Healthy City Board of Education v. Doyle, 429

The Sixth Circuit's opinion that these constituted employment related issues, rather that issues of public concern, is consistent with this Court's decision in Rankin v. McPherson, 483 U.S. 378, reh'g denied, 483 U.S. 1056 (1987). In that case, after hearing of an attempt on the President's life, an employee commented to a co-worker, "'if they go for him again, I hope they get him.'" *Id.* at 381. The employee's comments clearly had nothing to do with her job as a clerical worker for a law enforcement officer and related only to her opinion as a private citizen.

In this case, on the other hand, Rahn's complaints dealt only with her disputes and grievances as a Drake Center employee.

3. Rahn's Infusion of Popular Interest Buzz Words Were Clearly a Pretext for her own Personal Employment Grievances.

Rahn's infusion of certain buzz words such as "bond levy" and "patient endangerment"[8] and her request for public meetings

---

U.S. 274, 573 (1977)(the only subject of the teacher's complaint, a new dress code policy, was admittedly an issue of public concern where the dress code was prompted by the view of some administration "that there was a relationship between teacher appearance and public support for bond issues.").

[8] Specifically, the Sixth Circuit found that:

> the reference to "patient endangerment" in the press release does not make this a matter of public concern ***under the facts in this case.*** The only mention of patient endangerment in the press release is located in the following paragraph: "New work rules which have caused widespread discontent among the hospital staff which has created a high absenteeism, possibly developing a patent endangerment situation." The focus of this comment is . . . on the employees' discontent with new *work* rules which *might* lead

likewise does not transform her employee concerns into matters of significance to the general public. As the Eleventh Circuit stated in Ferrara v. Mills, 781 F.2d at 1516:

> a public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run.

See also Gillum v. City of Kerrville, 3 F.3d 117 (5th Cir. 1993), cert. denied, _ U.S. _ , 114 S.Ct. 881 (1994)(whether chief of police broke the law was public concern, but was not protected speech because that was not the focus of police officer's speech; his concern was continuing his own investigations when he had been told to provide all information to Internal Affairs); McMurphy v. City of Flushing, 802 F.2d 191 (6th Cir. 1986)(court noted that even plaintiff's express allegations of embezzlement and cover-ups were made out of ***"spite and frustration"*** and had little to do with matters of public concern)(emphasis added)); Gomez v. Texas Dept. of Mental Health & Mental Retardation, 794 F.2d 1018, 1022 (5th Cir. 1986)(state employee's complaints about the length of patient stay at a state center for the mentally ill and retarded did not address matters of public concern even though the employee claimed his statements addressed "the proper treatment of the mentally ill" or the allocation of public funds).

In Connick, the issue of public concern was not just used as a pretext to preface what were otherwise strictly employment issues. An assistant district attorney distributed a questionnaire to her co-

---

> to a patient endangerment situation. (emphasis in original).

(Slip Opinion at 12 (emphasis in bold added)).

workers. One of the questions in the questionnaire, positioned with equal magnitude to the other questions, asked whether the co-workers had felt political pressure to work in political campaigns. The district attorney felt that question "would be particularly damaging if discovered by the press." 661 U.S. at 141. The Court found that question ***inherently*** addressed a matter of public concern:

> We have recently noted that official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights . . . In addition, there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service . . . ***Given this history, we believe it apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal.***

Id. at 149 (emphasis added). However, even given these important interests, under the Pickering balancing test, the employee's discharge did not offend the First Amendment. *Id.* at 154.

In this case, Rahn's speech did not address matters that were of ***inherent*** concern to the public and the Sixth Circuit properly concluded that, ***on the facts of this case***, her references to popular sounding issues did not transform employment-related issues to matters of public concern. (Slip Opinion at 12).

4. Rahn's Attempt to Implicate the Expenditure of Public Funds Does Not Provide First Amendment Protection to her Speech.

None of Rahn's statements alleged corruption -- only a disagreement with Gilreath's authority as Chief Executive and his judgment in landscaping. In Barnes v. McDowell, the Sixth Circuit held "the mere fact that public monies and government efficiency are related to the subject of a public employee's speech do not, by themselves, qualify that speech as being addressed to a matter of public concern." 848 F.2d at 734, citing Murray v. Gardner, 741 F.2d 434, 438 (D.C. Cir. 1984), cert. denied, 470 U.S. 1050 (1985) (FBI employee's complaints about method of layoffs did not involve matters of public concern even though furlough plan involved disposition of public funds and quality of public work force). "Just because the expenditure of public funds is tangentially implicated does not automatically entitle the expression to protection." Barnes, 848 F.2d at 730. The Barnes court noted that:

> while a simple allegation that a public employee's speech disclosed corruption in a public agency satisfies the pleading requirements of the Federal Rules of Civil Procedure, those same rules require that when a defendant has moved for summary judgment, a plaintiff must present ***concrete evidence*** to support the allegation in order to survive the motion.

Id. at 734 (emphasis added).[9]

---

[9] On the other hand, in Shands v. City of Kennett, 993 F.2d 1337, reh'g, en banc, denied, 1993 U.S. App. LEXIS 17211 (8th Cir. 1993), cert. denied, __ U.S. __, 114 S.Ct. 880 (1994), a case relied upon by Rahn, is inapplicable to the facts here and does not contradict the Sixth Circuit's decision in this case. In Shands, the Eight Circuit held that the plaintiffs'

The Sixth Circuit properly found that there "is ***no evidence*** linking any of the allegations to corruption at Drake Center." (Slip Opinion at 14-15 (emphasis added), citing Barnes, 848 F.2d at 734).

C. THE SIXTH CIRCUIT PROPERLY CONCLUDED THAT RAHN'S SPEECH DID NOT ELEVATE AN EMPLOYEE DISPUTE INTO A MATTER OF PUBLIC CONCERN BECAUSE SHE LABELED IT A "PRESS RELEASE" AND SOUGHT MEDIA COVERAGE.

Rahn does not dispute the Sixth Circuit's conclusion that it is insignificant that her speech was contained in a "press release" and that she was interviewed by a local television, because it was Rahn who sought the media coverage by issuing the press release. (Slip Opinion at 13-14, citing Matulin v. Village of Lodi, 862 F.2d 609, 613 (6th Cir. 1988)(plaintiff's speech was protected when she participated in an interview ***initiated*** by the newspaper)); see Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988)(newspaper interview was protected speech when newspaper, ***not*** the employee, sought the interview); and see also Luck v. Mazzone, 1995 U.S.App. LEXIS 9101 (2d Cir. 1995)(public employee's anonymous call to a radio station correcting a news item about the extent of air conditioning in a public building in which she worked was essentially a private complaint).

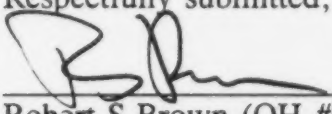
---

statements concerning the expenditure of public funds for firefighting equipment, the safety of firefighting equipment and the need to hire a person to disconnect gas meters during fires were matters of public concern and not merely a pretext for an employment dispute. Despite these matters of public concern, the appeals court applied the Pickering balancing test and affirmed the lower court's judgment notwithstanding the verdict that the plaintiffs' speech, under the facts of the case, was not protected by the First Amendment.

III. CONCLUSION

The Sixth Circuit correctly decided that Rahn's speech was not a matter of public concern and, under the facts of this case, is not protected speech. The Sixth Circuit's decision conforms to and follows the prior decisions of this Court and those throughout the circuits. Thus, Rahn's petition for a writ of certiorari should be denied.

Respectfully submitted,



Robert S Brown (OH #0004756)
(Member of the Court)
Kathryn Knue Przywara (OH #0043730)
Attorneys for Respondent
BROWN, CUMMINS & BROWN CO., L.P.A.
3500 Carew Tower, 441 Vine Street
Cincinnati, Ohio 45202
(513) 381-2121

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing have been sent to Paul H. Tobias and David G. Torchia, Esq., TOBIAS, KRAUS & TORCHIA, 911 Mercantile Library Building, 414 Walnut Street, Cincinnati, Ohio 45202, Attorney for Plaintiff-Appellee, by ordinary U.S. mail this the 30th day of May, 1995.

Kathryn Khue Przywara

Kathryn Khue Przywara (0043730)

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROSEMARY RAHN,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	ORDER
	:	
DRAKE CENTER, INC.,	:	
	:	
Defendant-Appellant.	:	

BEFORE: KEITH and NORRIS, Circuit Judges; and ZATKOFF, *District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Keith would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

---

*Hon. Lawrence R. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.